CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1825.

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CHARTRES vs. CAIRNES & AL.

CHARTRES vs. *CAIRNES* & *AL.**

A contract must be expounded according to the laws of the place it was entered into.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiff commenced his suit by attachment, which was levied on property and funds of the defendant, alleged to be in the hands of Tick Rogers, who was summoned as garnishee, and in the first instance deposed that he had no property or funds in his possession belonging to the defendants; but afterwards, on further interrogatories, disclosed the whole of the facts relative to property, which he once held for said defendants, and which had been assigned by him to persons, in trust, in the city of New-York, for the purpose of paying certain creditors desig-

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nated by the deed of assignment, and for his own support, until he should be discharged in pursuance of some insolvent or bankrupt system, and of this assignment the garnishee had notice previous to laying the attachment, and agreed to hold the funds for the assignees.

Under these circumstances, the court below dismissed the attachment, and from that judgment the plaintiff appealed.

The correctness of the judgment of the district court depends on the validity of the deed of trust; and its validity depends on the law of the state of New-York, as being *lex loci contractus*. Both parties, plaintiff and defendants, interested in the event of the suit, are citizens of that state; so, that whatever decision may be given the citizens of our state will not be affected. The task, which is often imposed on the courts of justice of the state of Louisiana, of deciding in controversies, between citizens, entirely of other states, in consequence of our attachment laws, is by no means pleasant for the tribunals, or useful to the community. With the best intentions to do right, it is with difficulty that error can be avoided in many cases, arising under our own laws; of which, the judges are presumed to

have competent knowledge. What then, must be the embarrassment and uncertainty, in deciding an intricate and complicated case, which is governed wholly by foreign laws, of which the court, probably, has no practical knowlege, and may be supposed to have little even theoretical?

As evidence of the laws of New-York, in relation to the present case, we are referred to decisions of the supreme court of that state, and court for the correction of errors, and also to decisions of the court of chancery, as reported by Johnson. They have been attentively examined by us; and it is believed, that the judgment of the district court is supported by them. In opposition to these decisions, a decree is furnished, lately made by a court of chancery in that state, by which the same deed of trust now under consideration, is declared null and void, by reason of the reservation or provision contained therein for the benefit of the grantor or assignor. This decision is most clearly correct, according to the laws of this state, on the subject of insolvencies; but it seems to be contrary to the principles, recognised as prevailing in the state of New-York, by the judgments of the supreme court, and court for the correction

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of errors, in the cases cited. Being a court of inferior jurisdiction, we cannot admit its decree has such force as to overturn those principles which seem to be established by the tribunal of highest authority. See *Johnson's Rep. vol.* 20, and the cases there referred to, *p.* 447, particularly, *vol.* 15, of this *Reporter*, *p.* 571.

It is therefore ordered, adjudged and decreed, that the judgment of the inferior court be affirmed with costs.

Livermore for the plaintiff, *Smith and M'Caleb* for the defendants.

LEWIS vs. *PETAYVIN.*

The record of a slave's conviction of theft, cannot be read in a suit between other parties.

If a note sued upon, as lost, is admitted by the defendant to have existed and not pretended to have been paid, presumptive evidence of its loss will suffice.

But the plaintiff will be made to give security for the defendant's indemnification.

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. This is an action on a note of the defendant, which is alleged to be lost, (10 *Martin*, 36,) the plaintiff having been robbed of it. The defendant pleaded the general issue, there was judgment against him, and the defendant appealed.

At the trial, the district judge, notwithstanding the opposition of the defendant, received

in evidence, the record of the conviction of a slave charged with robbing the plaintiff; a bill of exceptions was taken.

The counsel of the defendant relies strongly on the case of *Steele* vs. *Caseaux*, 8 *Martin*, 318, in which we held that the conviction of a slave cannot be read, in the action against his owner. That case was much stronger than the present, because owners of slaves are cited, on the trial, and have the opportunity of defending them.

Our learned brother, in the district court, was of opinion that "the record of the slave's conviction was good evidence to prove that a robbery took place on the plaintiff and to prove that act alone, the court received it."

The counsel for the appellee has urged, that in the case cited out of *Martin*, the record was introduced to prove the very point, on which the plaintiff predicated his right to recover, viz. that the defendant's slave had done him an injury, for which, he, the defendant was liable; whilst in the present, the record is offered not to prove the original transaction on which the note was given, nor even the existence of the note or its contents, but solely the collateral facts of its loss.

The answer of all this is that *all* facts must be

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proven by *legal* evidence, that the record of a conviction, to which the person, against whom it is offered, was not a party, is, as to him *res inter alios acta*. It is said the conviction may have been had on the evidence of the party, who offers the record in evidence. Slaves may have testified to the facts, and their evidence, which is of no avail against white persons, might thus have indirectly that effect, which the law denies it. If these were the only difficulties, a court might see by a perusal of the record, whether it was objectionable on either of these grounds. The true reason is that the party against whom it is offered might perhaps have made a legal objection to some of the witnesses sworn, might have cross-examined them and give quite a different colouring to their testimony, or might have rebutted it.

On this ground, we think the record ought not to have been read.

Objection was also taken to the reading of the deposition of Killiam, on the ground that the witness derived all his knowledge of the facts he related, from the plaintiff; but the judge states he considered it good evidence to prove that, on or about the 20th of June, 1820, the plaintiff had the defendant's note in his

possession, and that it was not endorsed.— These circumstances, the deposition shews the witness declares, not from what he heard the plaintiff say, but from what he saw.

The plea of the general issue, that is to say the denial that the defendant did make the note, the payment of which is demanded of him, is disproved by the written evidence afforded by him, and which it appears he permitted to be read, without opposition.

He certifies, under his own hand, that the plaintiff declared to him, that he had been robbed of the note, given him by the defendant, on the 15th of June for $720, payable at 60 days, and forewarned him not to pay it, unless it was brought with the plaintiff's endorsement. This certificate bears date of the 27th of June.

Killiam, whose testimony was objected to on the ground that his knowledge of the facts related, was entirely derived from the plaintiff, deposes that towards the middle of June, he saw, in the possession of the plaintiff, in Baton Rouge, a note or a paper, in the French language, purporting to be a note of the defendant, for $720, that he heard it read in English, by a person conversant in both languages, that it was not then endorsed.

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An advertisement, put by the plaintiff, in the Baton Rouge Gazette, on the 28th of June, 1820, announcing he had been robbed of the note, and offering a reward, was read without opposition.

Two witnesses Landry and Richard, deposed to the contract for a certain number of cattle, which the defendant paid for by his note to the plaintiff for $720 and $60 in cash.

All this testimony has been admited without any opposition, on the part of the defendant. Perhaps no part of it could have been succesfulld tendered, if the defendant's counsel had insisted on the legal proof of the robbery; but this evidence so received is legal evidence, by the permission of the defendant.

It is incontestibly proved that the plea of the general issue is absolutely false. We must then conclude that the defendant gave the plaintiff his note, that it is now due. He does not pretend that he paid it nor any part of it.

Why then does he resist the claim? Because he is afraid the note may be produced and he compelled to pay it. It is sworn it was not endorsed, a short time before (according to the plaintiff's declaration, certified by the defendant and read with his consent) the plaintiff

was robbed of it. But the plaintiff may recover, endorse and put it in circulation. No call has yet been made on the defendant, although five years elapsed, since proclamation of the robbery was made, and a holder who acquired it, after its maturity, would hold it liable to every equitable plea that might be opposed to the payee.

Still it is just the plaintiff should yield every possible means of indemnification to the defendant, against every possible chance. This the judge *a quo* decreed to him, by ordering the plaintiff to give bond with surety. The district court directed this to be done; but the defendant's counsel contends that the district court erred, in directing the bond to be given to the clerk, whilst it ought to be to the defendant. The bond is ordered to be delivered into the hands of the clerk, and this does not imply that it shall be payable to the clerk, but to the defendant, for whose benefit it is to be given.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Watts and Lobdell for the plaintiff, *Moreau* for the defendant.

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JOHNSON & AL. vs. INERARITY & AL.

JOHNSON & AL. vs. INERARITY & AL.

When the plaintiff fails to make out his proof, there must be judgment of dismissal or nonsuit.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petition in this case contains two distinct demands against the defendants, which are presented in the common law form, by separate counts. The first demands of them $130,000, and the second $200,000, on the following grounds:

That the defendants are surviving partners of the commercial firm of John Forbes & co. late of West Florida, and that the firm of Panton, Leslie & co., merchants and traders in the late Spanish province of West Florida, was composed of five partners, to wit. Wm. Panton, Thomas Forbes, ——— ———, Forrester, and Gen. Alexander M'Gilveray, of the Creek nation. That M'Gilveray died in November, 1791; and that the profits up to the time of his death amounted to upwards of $250,000.

That, at the dissolution of the said firm of Panton, Leslie & co. the firm changed to that of John Forbes & co. who assumed all the debts due by the aforesaid house of Panton, Leslie & co., and who took and received all the debts due the said firm, at a certain per

cent. discount. That, in the month of October, 1806, there was a balance due the estate of M'Gilveray by Forbes & co. of $53,000, which with ten per cent interest now amounts to a larger sum than $130,000, and that the heirs of M'Gilveray, for a good and valuable consideration, have legally assigned to the plaintiffs all their interest and right in the debts thus due by Forbes & co.

That John Forbes died in the year 1823, and the defendants, who are surviving partners of the house of Forbes & co. are responsible for the sum aforesaid.

The second count alleges the defendants' liability, by reason of the Seminole Indians having sold to the house of John Forbes & co. successors of the firm of Panton, Leslie & co. a large quantity of land, to pay a debt due to the latter. And to the one-fifth portion of which, or the proceeds arising from the sale thereof, the heirs of M'Gilveray, in right of their father, who was a partner in the house of Panton, Leslie & co. are said to be entitled.

To this petition, the defendants plead;

1. A general denial of every fact alleged in the petition.

2. A special denial that the defendants, or

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either of them, ever undertook, assumed, or promised to pay any debt which Paton, Leslie & co. or John Leslie & co. or any of the partners, or persons composing the said commercial house, or either of them, might owe to Alexander M'Gilveray, or to his heirs or representatives.

3. That the document under which the plaintiffs claim is not good or valid in law, because it attempts to sell a contested or litigious right, and because no lawful or valuable price or consideration was ever paid for the same.

On these pleadings, the parties went to trial in the court below, and the judge being of opinion the equitable plaintiff had not established his right to bring suit, gave judgment dismissing the petition. The plaintiffs appealed.

The point on which the court below decided the case, together with many others, have been argued with great care and attention in this; but the opinion we entertain on the merits of the case, as it appears in evidence before us, renders it unnecessary to examine the other questions, which have been raised and discussed.

The defendants, we have already seen, are

not charged in the petition with having been partners in the house of Panton, Leslie & co. of which M'Gilveray, under whom the plaintiffs claim, was a member.

This responsibility is charged, on the ground that the house of John Forbes, & co. of which the defendants are members, did, at the dissolution of the firm of Panton, Leslie & co. succeed to all its obligations active and passive, and that among the latter, was one of $53,000 to the estate of Alexander M'Gilveray, which Forbes & co. assumed to pay.

This responsibility is expressly put at issue by the answer: there is a special denial in it, that the defendants, or either of them, ever undertook, assumed, or promised to pay any debt, which Panton, Leslie & co. or any of the partners of said firm owed M'Gilveray, his heirs, or representatives.

Our enquiry, therefore, is, has that responsibility been established?

To prove it, the most important, nay, we might almost say, the only evidence produced, is a journal, which is brought into court by the defendants, under a rule directing them to produce the account books of John Forbes & co. and Panton, Leslie & co.

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Before examining the particular entries found in that book, and whether or not they establish the liability of the defendants, in the manner and to the extent, which the plaintiffs allege, it becomes important to ascertain whose book it was. If that of John Forbes & co. all that is written in it is evidence against the defendants. If that of Panton, Leslie & co it is not, unless some other part of the evidence shews these firms to be so closely identified, that their property, interest and responsibility, were the same. Nothing, however, of that kind appears to take the case out of the general rule.

On this point, it is unnecessary to recur to the internal evidence, which the book itself presents, for we have express and positive testimony. Gordon, swears, in the evidence which he gave before the book was produced, that the entry on which the plaintiffs rely, was in the journal of Panton, Leslie & co.: after the production of the book, he again states it to be one of the journals of that firm.

But the plaintiffs insist, that even admitting this book to have belonged to Panton, Leslie & co., still it makes evidence against the defendants, because the entries in it, charging the

house of John Forbes & co. with the sum due the late Alexander M'Gilveray, were made in the journal under the eye, and with the approbation of the members composing the firm of Forbes & co.

The journal, in which the entry relied on is found, is, as we have already stated, that of Panton, Leslie & Co. It commences in the year 1796, and the daily entries in it close in the latter part of the year 1798. Those which succeed, are few in number, and general in their nature, and seem to have been made (as far as we can gather from an inspection of them) from time to time, as the transactions, which had commenced during the period the partnership was in active operation, came to a close, or as the results in the other branches of the firm were ascertained. These entries continue at intervals up to 1806, at which date the books appear to have been closed. Among other accounts of a general denomination to which charges are made, and credits given, we frequently find that of "old concern," and "new concern," and these two partnerships, or perhaps, more properly speaking, modifications of the same firm, seem to have had an immediate and direct concern with each other.

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though not a perfect identity of interest. Among the last entries in the journal, the old concern is debited with the sum of $287,000, and three persons, to wit: William Panton, Thomas Forbes, and John Leslie, are credited with this amount.

Immediately succeeding these entries, there is a note by John Forbes, as executor of the three persons just mentioned, in which he states that he is convinced from various reasons that Alexander M'Gilveray, was a partner in the house of Panton, Leslie & co., up to his death, and that his heirs are entitled to a share in the profits of the firm up to that time. He therefore, proceeds to charge each of the three partners with the portion of the profits which he conceives Mr. M'Gilveray's succession is entitled to, and credits the latter with the amount. One of the defendants, who was executor to Panton, as soon as he discovered this principle had been acted on, in settling the affairs of Panton, Leslie & co., entered his protest against it on the books, but agreed the matter should remain *in statu quo*, until the case could be submitted with proofs to the lord chancellor of England. In a subsequent entry, we find William Panton, Thomas Forbes and

John Leslie, are made debtors to the new concern in the sum of $209,000, and to M'Gilveray's estate in that of $42,000.

From these facts as thus disclosed, the plaintiffs reason thus. The old concern was Panton, Leslie and co.; the new concern was John Forbes & co.; and, it appears, all the property of the former passed into the hands of the latter.

Now, whatever may be the real state of the case, there can be no doubt that these assertions when tested by the evidence, appear entirely gratuitous. There is no evidence. that Forbes & co. were meant by the term "new concern." There is on the contrary, evidence the other way. The book, it must not be forgotten, is that of Panton, Leslie & co. The entries, made in it, were to be posted into its ledger, and for the settlement of its affairs. Now, the accounts opened for "new concern," and "old concern," in which profits and losses were posted up and balanced, were entirely concerns, in which Panton, Leslie & co., had an interest. It follows, then, that if John Forbes & co. were meant by the term "new concern," Panton, Leslie & co., had an interest in the house of John Forbes & co., but this all the

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evidence in the cause contradicts. It is more than probable, the opening of accounts under these heads, in the books of Panton, Leslie & co., was rendered necessary, by the changes which took place, in consequence of the death of members of that firm, and the introduction of others previous to its dissolution. At all events we find, so *far back as the year* 1796, *an account opened in private for the "old concern."* This shews at that time there were certain interests which it were necessary to keep separate, and that they were designated by that term, in opposition to those which were then the "new concern." When therefore, the executors of the partners of that firm were posting up and closing the book, in 1806, they must be understood to use these expressions in relation to the interests and parties, which these expressions were first applied to in the books, or in other words, that the "old concern," and "new concern," at the close, were the same "old concern," and "new concern," whose interests for so many years had been kept separate and a part. If this be true, and we do not see how it can be doubted, then the "new concern" was in existence and had debit and credit on the books of Panton, Leslie & co., years before

the house of John Forbes & co. was formed. This appears a powerfula rgument, against the conclusion of the plaintiffs, that Forbes & co., were meant by the expression " new concern." For no reason has been given, or evidence introduced, to induce us to conclude, that the term, after having been used for a length oftime in relation to persons other than Forbes & co.' was afterwerds shifted to them.

The claim set up in the second count was abandoned in argument. The evidence is clear, that the lands were given in payment of debts, contracted after M'Gilveray had ceased to be a partner, in the house of Panton, Leslie & co.

We conclude our remarks, on this part of the case, by repeating, that whatever may be the real nature of the transactions, between the different firms which succeeded each other in this business in Pensacola, the evidence before us totally fails in supporting the plaintiffs' pretentions, and *de non apparentibus, et non existentibus eadem est lex.*

But, admitting with the defendants, that the house of Forbes & co. succeeded to that of Panton, Leslie & co. and became bound to pay their debts; still the claim of the petitioners

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cannot be sustained. For it was the debts due by Panton, Leslie & co. at the time of the dissolution of that firm they became responsible for. Now the claims, which M'Gilveray might have had in the profits of a former partnership under the same name, which had expired seven years before, formed no part of the debts of the new firm of Panton, Leslie & co. The surviving members, of the old firm of which M'Gilveray was a partner, owed him in their individual capacity his share of the profits. But their being indebted to him did not make any new partnership they might enter into, his debtor, nor give him a right to claim a share in any of the property which composed the stock of that partnership. His demand, or the demands of his heirs, should be directed against the heirs and representatives of his co-partners, who composed the firm of Panton, Leslie & co. at the time he withdrew from it, or ceased to be a member by his death.

On the whole, we conclude, there is no evidence the house of John Forbes & co. ever assumed to pay the heirs of M'Gilveray, their claims in the firm of Panton, Leslie & co. No evidence the funds of that firm ever passed with all its debts active and passive into the

hands of Forbes & co. and that, even if they had, they would raise no obligation in favor of the petitioners, their claim being against the former partners of M'Gilveray in their individual capacity, not against any new firm they might have subsequently entered into.

This opinion renders it unnecessary to examine any of the bill of exceptions taken on the trial. And it is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Johnson, Hennen, Ripley and Waggaman for the plaintiffs, *Workman, Grymes and Eustes* for the defendants.

VILLERE vs. *ARMSTRONG & AL.*

APPEAL from the court of the second district.

The testimony of the subscribing witness cannot be insisted on if he be out of the state.

The parish judge, who received the sheriff 's bond is a a good witness to prove its contents, in case of loss.

The party who excepts, is bound that the

PORTET, J. delivered the opinion of the court. Judgment was rendered, on motion of the attorney of the second district, against the two last named defendants, on a bond executed by Armstrong, as sheriff of Assumption, with Watkins and Candolle, his sureties. They have appealed, and in addition to the questions pre-

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sented by the bills of exceptions, have made the following points:

1. The bond is void under the statute set forth in defendants' answer.

2. The sheriff was never qualified according to law to collect taxes, and the sureties are not bound.

bill contains sufficient matter to enable the supreme coutt to test the opinion of the judge *a quo*.

The first bill of exceptions is taken to an opinion of the judge, admitting a witness to give evidence in relation to the loss of the original bond. The ground, stated in the bill for this objection, is, that in the written notice furnished by the attorney for the state, of his intention to move for judgment against the defendants, no mention is made of the bond being lost. To this a most satisfactory answer was given by the testimony, namely, that the loss had taken place after the notice was filed, 9 *Wheaton*, 581.

The second contains the same objection, as the first, with the additional reason, that the witness could not testify to the contents of the bond; that the subscribing witness to it should be produced. Other testimony shows the subscribing witness to have left the state; the secondary evidence was, therefore, correctly received.

The third exception was made to the court permitting the parish judge to give evidence of the loss of the bond, because it was his duty not to suffer the sheriff to act without giving bond and security, and, he was liable to a penalty if he neglected this duty. We see no ground for this objection. The parish judge was certainly a good witness to prove the loss, because the terms of the exception admit there is higher evidence behind; namely, the bond itself.—Now, if this be true, and the objection has no force, if it is not, then the parish judge was totally free from the imputation of not having taken the bond. And consequently, stood disinterested as to the fact of its loss.

But it appears the judge was also examined, to prove the execution of the instrument, by the sheriff and his sureties, and we are not so clear, that he was a legal witness for that purpose, but we deem it unnecessary to decide the question, as we are of opinion there is sufficient proof on the record, (exhibited by the answer of the defendants, and the testimony of witnesses to whom no legal objection can be made,) the bond was executed as the plaintiff alleges.

The fourth does not contain evidence to give

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us a sufficient understanding of it. If the written evidence, to contradict Hubbard, was matter of record, over which the court had no control, it should have been received, and the reason given by the judge was a bad one, namely, that the apparent contradiction in the witness' evidence, in the present case, and that which he swore in the suit of *Martin* vs. *Candolle*. arose from a mistake made by the court in taking down his testimony in the latter case. If, on the contrary, that testimony was in a trial had in the same term, over which the judge had control by correcting any error, which might have crept into a statement drawn up by himself, then it was properly refused. It was the duty of the party excepting to have brought up sufficient evidence to explain this, and for want of it, we cannot say the court below erred.

The fifth bill of exceptions is taken to a refusal of the court to direct a *subpœna duces tecum* to the parish judge to bring into court a bond, which that judge had previously testified was lost. There was no error in this opinion, and the exception to it appears to us most unadvisedly taken.

We have already said the facts on which

the state relies for judgment are satisfactorily proved, and the law arising on them requires us to give judgment against the defendants.—They have reproduced again, and argued elaborately, an objection frequently made in this court: that bonds required by statute are not binding on the obligors, unless the form and rules prescribed by the act under which they are taken have been pursued. Our opinion heretofore on such questions has uniformly been adverse to such a defence; and we have heard nothing in the present case to induce us to change that opinion. Indeed no reasoning on general principles could authorise us to do so, as by a statutory law of Spain, unrepealed as yet by our legislature, and of course still in force, it is expressly declared, "that in whatever manner a person shall appear to have deemed it proper to bind himself to another, he shall remain bound." *Novissima Recop.* 10, 1, 0. 3 *Martin*, 569, 5 *ibid* 194, *Vol.* 2 672. 5 *Mass*, 814. 9 *Cranch*, 28.

But it is agreed Armstrong, the sheriff, did not pay up the taxes he had collected the preceding year, and therefore he should not have been permitted to renew his bond the second. This objection could not be received from him

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and is consequently not good for his sureties, as they can have no defence, to the validity of the contract, which he had not.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Dumoulin for the plaintiff, *Ripley* for the defendants.

SACERDOTTE vs. *MATOSSY.*

No person has such an interest in the renewal of a license to keep a gambling house as may be the object of a contract.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioner states he purchased from the defendant the unexpired time of a license which he had to keep a gambling house, and also his right of preference to have the license renewed.

That by the terms of the contract the defendant was to have the benefit of the license up to the period it expired, but that on the day, instead of permitting the petitioner to get it renewed in his name, the defendant, in violation of their contract, obtained the license in his own, by reason of which the plaintiff has

been put to much expense and sustained great loss.

The answer denied the petition set forth any cause of action, and in case it did, it put at issue all the allegations contained in it.

The judge refused to hear any evidence in support of the petition, and directed it to be dismissed with costs. The plaintiff appealed.

We think the judge did not err. The legislature of this state has thought proper to tax, for charitable purposes, establishments of this kind, and whatever difference of opinion may exist as to the policy of such a law, it is the duty of the courts to give it effect, and enforce its provisions, as they would any other. By the 9th section of the act authorising the licensing houses of the description spoken of, it is provided, "that the licenses contemplated by this act shall be given by the treasurer of the state, and shall be for the term of one year, from the time of granting the same." No person has an interest in the renewal of these licenses, which can form the subject matter of a contract; no more than any other officer of the state would have to sell his right, to be re-appointed to an office which, by law, had a limited duration. The act, by fixing one year as

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the duration of these licenses, contemplated not only the collection of an annual revenue, but the exercise of a salutary check on persons, whose occupation is liable to be so much abused. No man then, can have a *right* to obtain a license, unless we should imagine a *right* founded on the treasurer of the state violating his duty, by making engagements to prevent the exercise of that discretion, which the law, for wise purposes, has conferred on him. In point of fact, we do not believe that officer made any such bargain, and if he did, the plaintiff's case would not be mended by it. *Ex turpi causa non oritur actio.*

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Seghers for the plaintiff, *Canonge* for the defendant.

MOULON vs. HIS CREDITORS.

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The endorser of an insolvent, who is also a debtor of his has only a right to be placed on the bilan for the balance.

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. In this case Jumonville, the appellant, opposes the homologation of a tableau of distribution of the insolvent's estate, on the ground of not being placed thereon, to the full amount of his claim, as one of the creditors.

The facts of the case appear to be these:

The appellant became a creditor of the insolvent to the amount of about $24,000, in consequence of endorsing the notes of the latter, which the endorser was compelled to pay on the failure of the maker. During the time of his responsibility, as endorser, he owed to the insolvent $6000, which he alleges, he retained in his possession, as a security or pledge against his liability on the endorsements.

His counsel insists, that he has not only a right to withhold that amount from the estate of the insolvent in compensation of his claim against said estate; but also to recover a dividend from the remainder, proportioned by the full amount of his demand of $24,000; because it is shown that the syndics will not have funds

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of the bankrupt to pay more than about 50 per cent. of the whole amount of debts.

In support of this doctrine, the appellant is declared to be privileged, on the pledge, which he has a right to retain until the whole of his claim be paid. To establish the truth of this proposition, we are referred to the principles which prevail in the commercial law of the United States, as recognized in the different states of the union. The principal authority cited is *Chitty* on *bills of exchange*, wherein at page 56, in the notes, references are found to the adjudged cases on which the author founds his dicta. These do authorise a person who has accepted bills for the accommodation of another, to retain the funds of the latter, or withhold debts due to him, under certain circumstances, as an indemnity against his liability as acceptor. The same rule ought to govern in case of endorsement to accommodate a maker of a promissory note. But, it does not follow, as a necessary consequence, that in the event of the bankruptcy of persons thus accommodated, acceptors and endorsers, should be at liberty to hold the funds in their possession or withhold payment of sums due to the bankrupt, in compensation of their claims against

him, and still receive a dividend of his estate in proportion to the full amount of such claims.

Such a conclusion is evidently absurd, for it would be to make the effect greater than the cause. Let us analyze the present case. The insolvent owes to the appellant $24,000, the latter owes to the former $6000, this last sum is only capable of effecting a payment of the first, *pro tanto*, in the ordinary course of trading, but if the doctrine contended for, by the counsel for the appellant be adopted, it will effect a much larger payment; for, by compensating the $6000, due from the appellant to the bankrupt, the debt due to the former will be only $18,000, of this it is agreed, that the estate of the insolvent will pay only $9,000; but, if the creditor be placed on the bilan for the entire amount of $24,000, then these $6000 will have paid $9000, which is absurd.

In this view of the case, we have considered that the right to retain a pledge, can have no more extensive effect given to it, than the privilege to compensate its value against claims of the pledgee. The privilege, allowed by the judgment of the court below to the appellant, to benefit by compensation to the whole amount of the debt he owes the estate, is as great as

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can be authorised by sound principles of law, equity and justice.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs to be paid by the appellant, in his individual capacity.

Moreau for the plaintiff, *Dennis* for the defendants.

DENNIS vs. *DURNFORD.*

An inhabitant of the city of New Orleans, cannot be sued in the court of probates of East Baton Rouge, on the ground that he was executor to a deceased person, whose *mortuaria*, was under the Spanish government, depending before the commandant of Baton Rouge.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The defendant, while the province of Louisiana was under the government of Spain, was appointed executor to the last will of Pousset, whose *mortuaria*, or proceedings in regard to his estate, were carried on before the Spanish commandant at Baton-Rouge.

Lately, the court of probates of the parish of East Baton-Rouge appointed the plaintiff as the attorney of the absent heirs of Pousset, and the defendant, a resident of the city of New-Orleans, was cited by the said attorney, before the said court of probates, to render an account of his executorship.

The defendant pleaded commorancy in another parish, viz. that of Orleans. There was a judgment against him, in the court of probates, which was reversed in the district court. The plaintiff appealed.

It does not appear to us that the district court erred. On the organization of a judiciary power, in this country, after the United States took possession of it, none of the courts that were established was a continuation of any Spanish tribunal. Accordingly, all suits then pending were begun *de novo* in the American tribunals, according to the court law, without any regard to the former tribunals.

A creditor, who had sued his debtor before the governor, intendant, or any magistrate, began *ab ovo*, in the court pointed out by the new law.

According to this, the defendant must be sued in the parish of his residence; this is the general principle; it has a few exceptions, but the plaintiff has not shewn that this case is within any of them. The tribunal of the commandant of the district of Baton-Rouge, before which Pousset's *mortuaria* was opened, has no longer a legal existence, and the circumstance, if it exist, of its records being deposited with

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the parish judge of the parish of East Baton-Rouge, does not authorise its court of probates to act on suits commenced in the Spanish tribunal.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Dennis for the plaintiff, *Hennen* for the defendant.

SHELMERDINE vs. *DUFFY.*

The obligation resulting from an endorsement, is a legal consequence, and if it render the endorser necessarily liable to pay, the law must determine in what capacity, and to whom.

APPEAL from the court of the first district.

Lockett, for the defendant. The defendant is sued as *endorser* of a bill of exchange, of which the plaintiff is the *drawer*. It is a well established rule of law, that, subsequent endorsers cannot be sued by any prior parties, unless under *special circumstances*, which must be fully stated; *Chitty on bills, ed.* 1821. 4 *Durnford and East*, 479, *Bishop* vs. *Hayward*. Now, unless those *special circumstances have* been stated, the plaintiff must fail in his action.

But it is insisted by the defendant, that this suit is instituted against him, solely, as endorser,

and he is sought to be condemned as such; and he relies on the allegations, in the plaintiff's petition, to make out clearly this point. The interrogatory also goes to confirm the defendant in this position.

The plaintiff says, that he has stated the circumstances, on which the defendant is liable. What are the circumstances? "That the defendant being, previously to the making of said bill, indebted to your petitioner in the amount of said bill, and equally bound to provide for its payment with said Johnson and Heno? &c." How was the defendant indebted? On bond, bill of exchange, or account? Why or wherefore? He is not informed. I can't even guess the nature of the plaintiff's demand. If this suit should be decided against the defendant, he never can set up the plea that the matters and things alleged in the petition have passed *in rem judicatam*, as it regards all the allegations in the petition, except those which relate to the bill of exchange, on which, in law, he is not liable, being a subsequent endorser.

In the case of *Brown & al.* vs. *Richardson*, *vol.* 1, 204, it is decided that, "it is not sufficient, that the facts necessary to be stated, to create responsibility in one character, establish liability

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in another, to authorise this court to conclude, that, therefore, the defendant was sued in both." Test the plaintiff's demand and petition by this rule, and it will fairly result that he has made out no claim, on the defendant. Strip the petition of all its allegations, except that part, with reference to the bill of exchange, and what cause of action remains? None but the loose and vague allegation "that, previously to endorsing the bill, the defendant was indebted, &c." Can it be concluded, that this averment is within the meaning of our statute, which requires the cause of action, the circumstances of places and dates, &c., to be set out with certainty. Will it be pretended that the petition can stand, or this suit be maintained under the slender and meagre allegations "of the defendant's being previously to his endorsement indebted, &c.?" Again, in the same case and page of the book last cited, the court say, "every thing in a petition, should be plain and perspicuous, and the party sued ought to be clearly instructed, *why he is sought to be condemned, and not left to infer it from doubtful, obscure allegations.*" "Are we clearly instructed here, why we are sought to be condemned?" No, for we cannot even *infer* why or wherefore. With regard to

our liability, as a subsequent endorser, we beg the attention of the court to the case cited from *Durnford and East's Rep. p.* 470, which is precisely in point.

Another ground on which the defendant relies, with considerable hopes of success, is, that the plaintiff being the drawer, and suing as endorsee, must allege and prove, that the interest of the payee is vested in him, that he has paid the bill, and that protest was made, and due notice given, &c., *vol.* 1, 301. There is no allegation in the petition, that, the bill in question was ever paid by the plaintiff, and the simple possession is no evidence of it. *Vol.* 1, 304.

Waggaman, for the plaintiff. The judge erred in giving judgment against the plaintiff on the ground that an action could not be maintained by the drawer against the acceptor of a bill. *Story's ed. of Chitty on bills*, 270 & 1. 2 *Philips on evidence*, 31. *Kid on bills*, 193. 10 *Martin*. 36.

2. On the demurrer, there ought to have been judgment for the plaintiff. 13 *Johnson*, 402. 3 *Binney*, 457. 4 *Cranch*, 219.

3. If the judge was correct in his opinion,

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that the action was not maintainable, he erred in giving a final judgment, it is a hard one, and at most ought to have been but an judgment of non suit.

MATHEWS, J. delivered the opinion of the court. This case was tried in the district court on pleas which the parties denominate a demurer and joinder therein, as taken from the *ordinary* mode of pleading, according to the rules of practice, under the common law of England. In conformity to the laws and principles, established by the laws which regulate the practice of courts, under our system of jurisprudence, it is an answer to the plaintiff's petition, by which the defendant admits all the facts, alleged by the former, but denies their legal consequence, as claimed by him. By this manner of pleading an issue in law is formed. Judgment was rendered in the court below, in favor of the defendant, from which the plaintiff appealed.

The suit is brought by the drawer of a bill of exchange, which he alleges was accepted by Johnson & Heno, and endorsed by the defendant for their use, the latter being equally bound in justice to pay the amount thereof,

because he was that much indebted to the plaintiff. The bill at maturity was protested for non-payment by the acceptors, and notice thereof given to the defendant as endorser; it was carried back by the payee as holder, to the drawer, who was compelled to pay the amount, with interest and ten per cent. damages, all which he claims to have refunded to him by the defendant. These are the principal allegations contained in the petition. It contains also an interrogatory, which was answered by the defendant, wherein he acknowledged that he did endorse the bill, but denied being indebted to the plaintiff, and that he agreed to become surety for the acceptors.

The court below seems to have based its judgment wholly on this answer, in which we are of opinion there is error.

In the first place, it ought not to have been received in contradiction of the facts, admitted by the demurrer; and secondly, even if should, it does not contradict them so effectually as to secure the defendant from liability. By admitting the act of endorsement, the obligation resulting from it, on the endorser, is a legal consequence; and if it necessarily render him liable to pay the amount of the bill, the law

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must determine in what capacity and to whom he is liable to pay.

The petition is not so explicit, as it might be in relation to the manner in which the appellee is sought to be made responsible; but from the whole contest, it is tolerably evident that the intention is to charge him as surety for the acceptors. The bill appears not to have been transferred, in the usual course of negociation, according to the custom of merchants. The payee was the holder, when he procured the endorsement of the defendant, which could have no other effect than to impose on him an obligation similar to that of the acceptors, either conjointly with them or as their surety, and perhaps he would be entitled to the privilege of division and discussion, as provided for by law in cases of joint obligations or sureties, but these are privileges which must be taken advantage of by pleading, which has not been done in the present case. Unless the irregular endorsement made by the defendant be considered as a mere nullity, an act without any legal effect, he ought to be held liable on it to the plaintiff; for, his obligation being similar to that of the acceptors, the drawer had a right on paying and taking up the bill to pursue him

for the amount. But we have held already, in one or two cases, that such endorsements are not without effect; on the contrary that they impose an obligation on the endorsers to pay. See *Chitty on bills, Am. ed. of* 1821, *p.* 440, & 4 *Martin*, 639.

Being of opinion that the allegations in the petition are sufficient in law, to authorise the plaintiff to recover, and that according to the answer they must be all received as true; it is ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled. And it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant and appellee, the sum of five hundred and sixty-two dollars and seventy nine cents, with interest thereon, at the rate of five per cent. per ann. from the date of the protest for non payment of the bill of exchange declared on, and also ten per cent. on the amount of said bill, as damages, with costs, to be paid by the defendant in both courts.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. JULY TERM, 1825.

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PILIE *vs.* MOLLERE.

If the fractions of a dollar be expressed in figures, the note is not therefore void, but the fractions will be rejected.

PILIE vs. *MOLLERE.*

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. The present suit is brought on the note which was the ground of the case between these parties in July term last. *Vol.* 2, 666.

The plaintiff now declares on a note, for $2171, considering the 38 cents, which are written in figures, and not in words, at full length, (as the act requires,) as if they were not written.

There was a plea of the general issue, and a judgment of non suit. The district court being of opinion that the note was not obligatory, and could not be given in evidence.

The note was executed on January 5th, 1824, while an act of the legislature, (since amended) was in full vigor. This act, approved on the 1st of March, 1823, provides that, after the 1st of April following, no promissory note shall be obligatory or admissible in evidence, unless the sum of money therein expressed to be payable, be expressed in *words at full length.*

It is clear that the strict sense of the words used supports the decision of the judge *a quo*, and when the case was before us last year, we were inclined to believe, that when it became necessary to pronounce the opinion of this court, on the construction of the act, we should be obliged to adopt his conclusion.

On maturer reflection, we think that it leads to disastrous and absurd consequences, manifestly contradictory to common reason. In such cases, we deem it our duty to avoid a strict literal construction, in order to avert a result, evidently in opposition to the presumed will of the legislature; believing that the expressions used leave it doubtful, whether the legislature meant that the note should be *absolutely* void of obligation and inadmissible in evidence, or whether it should be so only

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for the part in which its directions have been disregarded.

If the fractions of the cents only were in figures, as if a note was for five hundred dollars, sixty cents & 1-4, it would be monstrous to say the note should be considered as a nullity. The present case is nearly as strong.

Judges must construe the law, if possible, to prevent waste & destruction, *ut res magis valeat quam pereat*, and they must not suffer what is useful to be vitiated by what is useless: *utile per inutile non vitiatur.*

We consequently think it our duty to say that the note is obligatory and admissible in evidence, as to the part of it, in which the directions of the legislature have been complied with; that the cents, as with regard to them these directions were disregarded, are to be considered as not expressed,and their being in figures does not vitiate the note, so as to prevent its being obligatory and admissible in evidence.

The act of last session, which amends the former, may, in some degree, afford a clue, by which we may be enabled to discover the will of the legislature. Indeed, it is a quasi legislative construction of the former.

The testimony supports the plaintiff's claim.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the plaintiff, for two thousand four hundred and seventy-seven dollars, with interest at five per cent., from the time of the protest, according to the act of 1822, p. 44, and costs in both courts.

Derbigny for the plaintiff, *Hennen* for the defendant.

FARRAR & AL. vs. *M'CUTCHEON & AL.*

A devise to the mother for life, remainder to the children, in equal parts, to be held for the survivors, down to the last, in the event of death before marriage or without issue, is a substitution, which the law reprobates.

APPEAL from the court of probates of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. The question, which is submitted to the court, in the present case, for solution, arises out of a supplemental petition of the plaintiffs, filed in a suit, which was commenced for the purpose of obtaining a final liquidation and partition of the estates of the late Richard Butler and his wife, amongst their respective heirs. It relates entirely to that part of the last will and testament of the said Richard, which disposes of the residue of his property (after va-

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rious specific legacies) to his two sisters, Rebecca M'Cutchen, and Harriet Hook and their children. The sole object of the petitioners, according to the tenor of the supplemental petition, seems to be to obtain a decision on that clause of the will which gives to the children of the sisters of the testator, *i. e.* whether it be void, as containing a substitution prohibited by the Civil Code, according to the provisions of the 4th *chap.* 42, & *book* 3.

The judgment of the court below is against the right of the children, from which an appeal was taken by their *defensor* or *curator ad litem.*

This is the first instance, in which the courts of justice in this state have been required, in the course of judicial proceedings, to apply the law relating to substitutions to a particular case, according to the ordinary rules of construction or interpretation of dispositions made by testament.

The question, which now occurs to us for the first time, has, however, been considerably agitated in various tribunals of the kingdom of France, and we are aided by many decisions in cases depending on the 896th article of the Code Napoleon, which is similar to our own

code, on the subject of substitutions and *fidei commissa*. It is true, that from a hasty view of these discussions, they seem to be somewhat contradictory in themselves, but on a closer inspection and more minute investigation, they are capable of being pretty well reconciled. From them and commentaries on the French code, several axioms or general principles are deducible, which we believe to be correct.—1st. The dispositions of testaments ought not to be annulled, until they necessarily present a substitution. 2d. If the claim be susceptible of two interpretations, it ought to be interpreted in that way, which avoids a substitution and gives effect to the will. 3d. Whenever the disposition is made in such terms as necessarily to comprehend a charge to keep for and transmit to a third person, it contains a substitution, although not literally expressed. 5 *Toulier*, 58 & 69.

It may also be safely admitted as true, that in every substitution or fidei-commission, the agency of three persons is required, viz., the donor or testator, the person who receives the donation to hold and enjoy for a certain time, and the one to whom he is bonnd to transmit it. See *Pandectes Françaises, vol.* 4, *p.* 21, a quotation from *Merlin quest. de droit.*

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The clauses, in the will now under discussion, which the plaintiff insists, do necessarily imply a substitution, are expressed in the following terms. After various legacies ordained by the testament, as above stated in general terms; the testator proceeds, "item, I give and bequeath all the rest, residue and remainder of my estate, property and effects, to my sisters Rebecca M'Cutcheon, and Harriett Hook, to have and to hold the same, equally to be divided between them, for and during their natural lives. Item, upon the death of the said Rebecca M'Cutcheon and the said Harriett Hook, or either of them, I do give, devise and bequeath, the share or shares, which the said decedent or decedents shall have possessed as aforesaid, or which by the last above devise and bequest, I intended, she or they should possess, to the child or the children of the said Rebecca M'Cutcheon and Harriett Hook, or either of them, to be equally divided between the said children; and in case of the death of either of the said children, previous to marriage or death without issue, then his or her share to be equally divided among the surviving children as aforesaid, and in case only one child as aforesaid should survive, then the share or

shares above last mentioned, and the estate and property aforesaid shall vest and remain in the said child and his or her heirs aforesaid.

The counsel for the plaintiffs contends that according to a just and legal interpretation of these dispositions of the testament, they present two substitutions. 1. The donation to the sisters of the testator, to hold the property during their lives, and transmit it to the children. 2. The right of survivorship, created amongst said children. From these positions the nullity of both clauses (is said) to be necessarily induced. As to the first of these alleged nullities, it is believed, not to be put in issue by the pleadings of the case, and is perhaps such, supposing it to exist, as could only be taken advantage of by the legal, forced heirs of the testator. The same thing might be said of the latter substitution, except for an alleged compromise or transaction, which is said to have taken place between the heirs of the testator and those of his wife, both instituted, and forced or legal. In the consideration of that allegation we proceed to examine the donation to the children: and we commence by stating that, in our opinion, the clause of the will, under which they take, does necessarily contain a substitution.

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In opposition to this opinion, which is the same that was held by court of probates, it is contended, that a donation or legacy to several persons, with the right of survivorship, does not *ipso facto* present a substitution. This may be true, where an entire thing is given to many; and its truth is well supported by several of the cases cited from the French authors on the subject of substitutions. See 5 *Toulier*, *p.* 60, *n.* 46.

But this is only true, when an entire thing is left to several persons, who hold it undivided. When, by the disposition of the will, it is evident that the legacy left to many is bequeathed in separate and distinct portions, with a right of survivorship, a substitution takes place *ex necessitate rei*. See the same authority, *p.* 67, *n.* 49.

Now, in the present case, the devise to the children, of the property, which had been given to their mother, for life, is in equal parts, to be held for the survivors, down to the last, in the event of death before marriage and without issue. In relation, therefore, to them, we have no doubt of the existence of a substitution, such as reprobated by the code. We have pronounced, on this case, without having enquired very particularly whether the children of Mrs.

M'Cutcheon & Mrs. Hook, have been properly represented in the cause. It is however, a matter of no great moment; for, if they are not before the court, according to the forms and solemnities of law, the present judgment will not affect any claim, which they may hereafter make, relative to the matters now in dispute.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, &c., and it is further ordered, that the costs of this appeal be borne by the estates of R. Buller and his wife, in equal portions, &c.

Dennis for the plaintiffs, *Watts and Lobdell* for the defendants.

HYDE & AL. vs. HENRY.

APPEAL from the court of the first district.

The record of a suit cannot be used as evidence against one who was not a party thereto.

Declarations, operating a change of domicil, must be made both in the parish the

PORTER, J. delivered the opinion of the court. This action commenced by a personal citation on the defendant, and a seizure of the schooner, the latter was released by a subsequent order of the judge, and in our opinion correctly, as the plaintiffs' account shews a credit

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party removes from, and that to which he removes.

which must be imputed to the debt that was most onerous to the defendant. *Vol.* 3, 179.

The only question the cause presents is of jurisdiction. The defendant pleaded he was a citizen of St. Tammany, and could not be sued in the parish of New-Orleans. The judge thought differently, on the evidence offered to prove this fact, and gave judgment against him from which he appealed.

Before examining the correctness of this opinion, we must express ours on a bill of exceptions to a decision, by which the judge *a quo* permitted the record in the case of *F. Dow* vs. *Henry* to be read in evidence, to prove the change of domicil of the defendant. In this we think he erred. It was *res inter alios acta*. Nor could the circumstance of the defendant's own declaration, being evidence of a change of domicil make it good, for *non constat* that the plaintiffs, had they been a party to the suit, could not have objected to the authenticity of the declaration, as introduced in evidence in that case.

But that declaration could not have availed the defendant, for the law requires that declarations, which shall have the effect of operating a change of domicil, by evidencing the intention of removing, must be made before the

judge of the parish where the party resides, as well as that where he is going to settle. *Civ. Code*, 19 *art.* 1 & 2.

We do not think the judge erred in his conclusion from the other testimony in the cause, and do therefore order, adjudge and decree, that the judgment of the district court be affirmed with costs.

Carleton and Lockett for the plaintiffs, *Preston* for the defendant.

DOW vs. *SHIMMIN.**

If a written synallagmatic contract be deposited in the hands of a third party, who gives to each of the contracting parties a receipt for it, it will be read in evidence, at least as a beginning of proof.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. This is an action, for work and labor done by the plaintiff, for the defendant, in filling up the latter's lots, with dirt, on a quantum meruit, $480, are claimed.

The answer admits the work and labor, but avers that it was performed under a special written contract, in which the compensation

* This opinion was delivered in May, but was not printed with the cases of that term, a motion having been made for a rehearing.

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of the plaintiff was fixed at $195 50. The defendant avers the writing has come into the hands of the plaintiff, and he prays, that on his failing to produce it, testimony of its contents may be received.

The plaintiff had judgment for $195 50, and appealed.

The record shews that at the trial, the defendant offered in evidence the written contract, which it appeared had been deposited with J. O'Brien. The plaintiff objected to its being read, as it contained sygnallamatic obligations, and was not made double. The plaintiff's objection was overrulled, and the plaintiff's counsel took a bill of exceptions.

The defendant offered O'Bryen, the writer and depository of the contract, to prove the execution and deposit of it. This was objected to. The plaintiff took a bill of exceptions, on the objection being overruled.

O'Brien deposed, when the written contract was entered into, it was deposited with him for safe keeping, and he gave to each of the parties a receipt for it. He said it was the only contract made and he gave evidence of its contents and recognised one of his receipts that was produced. He reduced the contract

to writing in presence of both parties, and subscribed it himself as a witness.

The written agreement, deposited in the hands of a third party, who gave each party a copy, is at least *prima facie* evidence of their bargain and the testimony of this common friend, appears to place it beyond doubt. We think the court below did not err, either in admitting it, or the evidence of the writer, in addition to the agreement, admitting it did not make full proof.

The agreement being fully established, it appears judgment was correctly given on it.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

The court, having at this term, heard counsel, on a rehearing, Porter, J. delivered the opinion of the court. An application has been made for a re-hearing in this case, and the counsel opposed to it has been heard. The only question is that of costs, the payment of which to the plaintiff depends on his having proved an amicable demand, the evidence establishes it was made, and the parish court erred in not giving judgment for them against the defendant.

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It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff do recover of the defendant the sum of $195 50, with costs in both courts.

M'Caleb for the plaintiff, *Preston* for the defendant.

BAINBRIDGE vs. *CLAY.*

The creditors of the assignor may seize the debt assigned, as long as the assignee has not given notice of the assignment to the debtor.

Appeal from the court of the first district.

Martin, J. delivered the opinion of the court. This case was lately remanded for further proof, the same judgment was given, and Bainbridge appealed. *Vol.* 3, 671.

The facts of the case are, that Clay obtained a judgment against Oldham, and Bainbridge one against Clay. Bainbridge having taken out a *fi. fa.* on his judgment, Polk, the agent of Oldham paid into court the amount of Clay's judgment against Oldham, and Bainbridge prayed that the court order the money thus in court to be applied to his judgment.

Hennen intervened and claimed the amount of the judgment against Oldham, as assignee of

Waggaman to whom he alleged Clay had assigned it.

A debt due to the defendant on a *fi. fa.* cannot, as to third parties completely pass to the assignee, unless there be what, in sales of tangible property, is called a tradition, or delivery, and this is effected, as to *choses* in action, by notice of the assignment to the debtor.

In the present case, the record shews that the sheriff received Bainbridge's *fi. fa.* against Clay, on the 1st. of February, 1825. On that day, according to law, Clay's personal property was so affected by the *fi. fa.* as no longer to be saleable by him, to the injury of the plaintiff in the *fi. fa.*

Folwell, a witness of the assignee, deposes he delivered a copy of both assignments to Oldham, on the fourth day after he left New-Orleans, and he believes he left that city on the 31st of January. So that, according to this witness, the notice, which was in lieu of the tradition of property, took place, after the *fi. fa.* of Bainbridge was put in the hands of the sheriff.

Farrie, another witness of the assignee, deposes that, in a conversation that took place in the clerk's office, between Hennen, Waggaman,

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and Polk, the agent of Oldham, he heard Hennen tell Polk, he was the assignee of Clay's judgment against Oldham, and requested Polk not to pay the money to any body else. The witness believes this was before Bainbridge took out his *fi. fa.* against Clay, but he cannot recollect any particular circumstance that induces this belief; neither can he recollect the time, when he issued the execution *i. e.* when it went out of the office. He is the deputy clerk. Polk's testimeny does not make the evidence much clearer.

Admitting what is extremely dubious, that it clearly results from this man's testimony, that the conversation with Polk took place before the *fi. fa.* issued, nothing shews that Polk was such an agent, to whom such a notice could be legally given. It only appears he had Oldham's money in his hannds and was directed to discharge the judgment.

We therefore conclude this conversation does not establish a legal notice. Polk did not consider himself authorired to pay Hennen, although he proposed giving his check, since he paid the money in court.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

be annulled, avoided and reversed, and it is further ordered that the money in court, paid by Polk in discharge of Oldham, be applied to the discharge of Bainbridge's judgment against Clay, and that the assignee and appellee pay costs in this court.

Waggaman, on an application for a rehearing. The notice to Polk, the day before issuing the execution of Bainbridge, is proved both by Polk and Farrie. But it is said Polk does not appear to have been such an agent as could receive notice. What was Polk's agency? To pay over this money in satisfaction of Clay's judgment merely. But the law gives him in addition all the powers necessary to carry this into execution, in a proper manner, *e. g.* to take receipts for the payment, and to see satisfaction entered on the record, and he would have been wanting in his duty, and answerable to Oldham, for neglecting to do so. This satisfaction could only be entered by Hennen, and Polk must have paid to the claimant. It may be said, that Oldham, had no means of knowing of the assignment, and could not have intended an authority to meet it; this is true, but he knew the judgment was *assignable*, and might be transferred; though he could not foresee the claimant would be the assignee,

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the person who was to receive, was of no consequence; the satisfaction of the judgment was the object of the mandate, and it seems to be going too far, to say Polk's authority did not extend to informing himself who was the person authorised to receive. Had Clay died in the interval, Polk might well have received notice of, who were heirs or executors, and paid accordingly. See the case of *Touro* vs. *Cushing*, *vol.* 1, 425, In a similar case a notice was given by an agent, and no question was made as to his authority; and, if an agent's power authorises him to give, it would seem to authorise him to receive, notice. The right to receive this notice appears to be an affair for Oldham to decide upon. But if Polk was not such an agent as to receive notice of an assignment of a debt, how could he be such an agent as could receive notice of its seizure; for, as will be seen hereafter noticed, it was not the money that was or could be seized, it was the *debt*, the incorporeal right due from Oldham to Clay, and that should have been seized in the debtor's hands, which leads to the second question.

Was the *fi. fa.* a lien on this money? And could the plaintiff legally seize it, under the

terms of the writ, "property of John Clay?" The debt attempted to be seized, is due by Oldham to Clay, and is clearly the property of the latter; but Oldham resides in another parish where the sheriff of Orleans could not act, nor could a *fi. fa.* in his hands bind or prevent the transfer of Clay's property. It is therefore, clear that the execution of Bainbridge did not attach to or bind the estate of Oldham, unless the *identical* money in Polk's hands, was the property of Clay. Independently of the express admission, page 5 of the record, that the money was Oldham's, and that Polk had no property of Clay in his hands, surely Oldham might, at any instant before the seizure, have withdrawn it from Polk's hands; he might have applied it to the payment of another debt, or put it in his pocket and suffered Clay to seize on his property. Had it, the money, been stolen or destroyed, no one would been heard to say the loss was Clay's or that his judgment against Oldham was thereby satisfied. Had there been an attachment or seizure in the sheriff's hands, on the judgment of Clay against Oldham, there cannot exist a doubt, it might have been seized and sold as his property; but it is difficult to comprehend how calling it Clay's pro-

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perty, in the absence of any thing like a writ of seizure or execution on the part of Clay, could make it his. Suppose Clay had agreed to receive, in satisfaction of his judgment, a piece of land or a slave, could Bainbridge before the conveyance made, seize it as Clay's. The party until the execution of the act may always retreat, and in the case of the money, he could equally have refused its payment to Clay; it was still under the controul of Oldham, until execution or seizure by Clay, and he was competent to dispose of it at pleasure. The plaintiff has mistaken an intention to pay, for an actual payment and has mistaken Oldham's money, for Clay's debt. The latter he might have seized in Oldham's hands, by an execution directed to the parish of Lafourche, the residence of Oldham; the former upon the principles of the judgment he could not seize, as Clay's property, until it was delivered, any more than he could have seized a lot of sugar and cotton shipped to the debtor, against the proceeds of which, were to be applied to the same purpose.

Hennen, on the same side. The appellee would respectfully suggest to the court, that a

part of the record has been overlooked in deciding this case.

The letter of Oldham, introduced by the defendant, without exception thereto by Bainbridge's counsel, acknowledges the receipt of the letter of the defendant, dated 25th January, 1825, announcing the assignment of the debt by Clay. Another letter of the 30th January, 1825, stating the same fact, was received by him. Further, the defendant offered a witness to prove that notice had been given to Oldham, by his own acknowledgment, prior to the execution of Bainbridge. This evidence was rejected below; and a bill of exceptions taken. This appears not to have been noticed by the court, as nothing is said on the point, in the opinion delivered. It is believed that this evidence was admissible; if so, the complexion of the case would be totally changed, should the cause be remanded for the purpose of receiving this evidence.

For these reasons the appellee prays that a rehearing may be granted him.

The rehearing was refused. In announcing this, MARTIN, J. said—We have considered that the notice to Polk had not the effect of

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destroying the right of the plaintiff in the *fi. fa.* This notice was not equivalent to a delivery or tradition, for it left Oldham the absolute controul of the thing assigned. He might, notwithstanding this notice, till it was communicated to him, have made a legal payment to Clay, or any other assignee, besides Hennen, who might have presented himself. Hennen was like a purchaser of goods, before delivery, till knowledge of the assignment was given to Oldham himself; for till then a payment would have defeated his right on Oldham.

By placing his *fi. fa.* into the sheriff's hands, Bainbridge acquired a lien on Oldham's property, susceptible of being levied on, on all Clay's goods in his stores, or any of his agents, holding for him, on the debt of Oldham, in the hands of Polk, or any other agent, and this right was not defeated by Polk paying the money into court.

In the present suit, both parties had a claim which the court might have recognised. Bainbridge had a *fi. fa.* which gave him a lien on any property of which Clay had the disposition. This money, then, being at Clay's disposition, would have been ordered to be paid to him, unless another person opposed his demand

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by shewing a better right. Let it be granted that Hennen might have successfully opposed Clay's call on the court. How stands the matter between Hennen and Bainbridge? Hennen has an assignment; but the assignment of a debt is not in the way of a creditor, till served on the debtor; because that service alone deprives the latter of the faculty of paying to any one, but the assignee. Bainbridge, on the contrary, produces a *fi. fa.* which gives him a lien on all Clay's property. It attached on the debt, due to Clay by Oldham, on the money, the instant it was paid in discharge of Clay's judgment, and thus became Clay's.

But it is said there is evidence of notice to Oldham himself.

According to Folwell's testimony, copies of the assignments were delivered to Oldham on 4th of February; the *fi. fa.* was put in to the sheriff's hands on the 1st. According to Farrie, admitting that the notice to Polk was notice to Oldham, there is no great certainty that Polk was notified before the *fi. fa.* issued. The witness believes it, but cannot recollect any circumstance that induces such a belief. These gentlemen are Hennen's own witnesses.

Our attention has been drawn to a letter of

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Oldham, in which he acknowledges the receipt of Hennen's letter, apprising him of the assignment: but this letter is without a date; and its post-mark refers to a day posterior to that on which the *fi. fa.* came to the sheriff's hands.

So that no part of the evidence on the record establishes, what is essential to Hennen's recovery, notice to Oldham, anterior to the sheriff's receipt of the execution.

We did not consider the bill of exceptions required any notice. It appeared to us obvious the judge was right. Evidence was offered of "the verbal acknowledgement of Oldham to the witness, that he had received notice of the assignment from Clay to Waggaman, and Waggaman to Hennen, before the execution issued in favor of Bainbridge."

Now this was mere hearsay testimony. Oldham should have been brought. It is now said here, that this acknowledgement was made *before* Bainbridge took out his *fi. fa.* But if that was the case, the counsel ought to have made it appear on the record.

M'COY vs. *HIS CREDITORS.*

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M-Coy vs. His creditors

The fees of the counsel appointed to represent absent creditors, are in no case to be paid by the mass.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The attorney appointed to represent the absent creditors took a rule to show cause why a certain sum due him for professional services to the absent creditors, should not be paid by the estate. The court after hearing the parties discharged the rule, and the attorney appealed.

The following facts have been agreed on:

1. It is admitted the failure was under the Spanish law, and not under the act of 1817, relative to voluntary surrenders.

2. The value of the services is admitted, and that L. Pierce was, from the commencement, the attorney for the absent creditors, and appointed by the court.

3. It is admitted no dividend will be coming to the absent creditors.

The act of 1817, section 38, expressly provides, "*that in no case* shall the fees of counsellors, appointed in behalf of absent creditors, be paid by the mass, but shall be levied on the amount of the sum, which shall be recovered for the creditors so absent.

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M'Coy *vs.* His creditors

We are of opinion, that this act, by the negative expressions used in it, in relation to the particular subject under consideration, takes away all discretion from the courts, and forbids a recurrence to the Spanish law, or practice, to ascertain how the representatives of absent creditors shall be paid. And even if it did not, we have been unable to find any thing in either, which sanctions the present demand.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Pierce for the plaintiff, *Maybin* for the defendants.

CHANGEUR vs. *GRAVIER'S HEIRS.*

The heirs are bound only to the amount of what the estate was worth at the death of the ancestor.

If a debtor on receiving a release, bind himself to pay the debt if he becomes able, his heirs will be bound to apply his estate to the discharge of the debt.

Appeal from the court of the first district.

Martin, J. delivered the opinion of the court. This case was before us in June, 1824, and we remanded it, because the record did not enable us to ascertain the portion of the released debts which the estate can pay. *Vol.* 2, 545.

The plaintiff contends that a piece of property, known under the appellation of the bat-

ture of the faubourg St. Mary, which makes part of the estate of B. Gravier, ought to be valued at $100,000, which is admitted to have been its actual value in 1820, when under a judgment of this court, this property was, it is said, finally divided among the defendants; it having been decreed the preceding year to be their common property. 6 *Martin*, 281. *Gravier & al.* vs. *Livingston & al.*

The defendants urge that this property ought to be valued, between the plaintiff and them, at its value in 1793, at the death of their ancestor.

2. The defendants further hold they are not liable for any part of the released seventy-five per cent. unless their ancestor, at his death, had come to so good a fortune, as to be able to pay the whole amount of these released debts with interest.

I. On the first question we are of opinion that the heirs are chargeable only for the value of the batture, at its value at the time of their ancestor's death, viz. $10,000. It appears this piece of property was, long before our decree, in possession of one of the heirs, who disposed of the whole, and that afterwards the other heirs sued, and recovered their part of it from the vendees.

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CHANGEUR vs. GRAVIER'S HEIRS.

II. If, at the death of B. Gravier, he had property sufficient to discharge a part of the released debts, we think his heirs are bound to distribute the proceeds of his estate, among the creditors; their ancestor promised that "If God blessed his endeavors, he would pay them their whole claims, principal and interest, when his situation would allow it."

The facts of the case show that, after paying B. Gravier's debts in Louisiana, there remained a balance of $39,542 75, to be applied to the payment of his debts in Bordeaux. These debts are shewn to have amounted at his failure, to $53,671. For one fourth of these he promised to pay at 12, 18, and 24 months, & after a period of upwards of forty years, they must, in the absence of any proof of their remaining due, be presumed to have been discharged; except that of the present plaintiff, which is demanded and we have said is not prescribed, equal to the nett proceeds of the estate after the payment of the debts posterior to the concordate.

The plaintiff is therefore entitled to the one fourth of the original debt, which was to be paid absolutely, and to his dividend, on the balance left from the sum of $39,442 75, after the deduction of the fourth of his original debt.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be amended in the following manner, that is, that judgment be entered in favor of the plaintiff, 1st. For the sum of $571, with interest on a third of the sum, since the 29th July, 1785, on a third since the 27th January, 1786, and on the other third since the 28th July, of the same year, at the rate of five per cent. per annum, making the further sum of $1137, 2d. For the sum of $1696, with interest at the rate of 5 per cent. per annum, since the 13th of July, 1821; being the further sum of $338, making in all the two sums and interest, the total amount of $3742; to be paid one fourth by each of the defendants, with interest, until paid at the rate assigned.

It is further ordered, that the defendants pay the costs of the court below, and the defendants and appellee pay those in this court.

Dennis for the plaintiff, *Derbigny* for the defendants.

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DAVENPORT'S HEIRS
vs.
FORTIER & AL.

A bill of exceptions will not be considered, if circumstances render its examination of no importance in the cause.

DAVENPORT'S HEIRS vs. *FORTIER & AL.*

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This suit is brought to recover the two last instalments of the price of a tract of land as stated in the case lately decided. *Vol.* 3, 695.

In the first case we have reversed the judgment, and allowed the defendants the benefit claimed under the bill of exceptions which relates to the introduction of evidence to establish a deficiency in the quantity of the land sold.

A similar bill of exceptions is found on the record in this case; but as it is evident from the pleadings and evidence in the cases, that the sum claimed by the plaintiffs, in the first, will be amply sufficient to cover any reduction of the price, which may be decreed on account of deficiency in the thing sold.

It is ordered, adjudged and decreed, that the judgment of the district court in this case be affirmed with costs.

Preston for the plaintiffs, *Duncan* for the defendants.

FLOWER & AL. vs. *ARNAUD.*

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FLOWER & AL.
vs.
ARNAUD.

APPEAL from the court of the parish and city of New-Orleans.

A debtor, the claim on whom has been seized and sold, may retain against the purchaser whatever he might retain against his creditor before the sale.

The treasurer may withhold from a person, to whom the legislature has made an allowance, the amount of his taxes, for which the collector has reported him as a defaulter to the treasurer.

MARTIN, J. delivered the opinion of the court. On the dissolution of the injunction, in this court, in the suit of *Flower* & *al.* vs. *Livingston*, *vol.* 2, 514, the plaintiffs took out an alias *fi. fa.* which was levied on "the right of the defendant to the sum of $800, which may now be, or hereafter may become due, by the state, &c., being part of a greater sum allowed him, by an act to fix the compensation to be allowed to the jurisconsults, appointed to revise and amend the civil code, &c." The plaintiffs became the last bidders for this right, at the sheriff's sale, and brought suit against the defendant, the treasurer of the state, who had refused to pay.

The answer denied the right of the courts of justice to seize moneys to be paid by him to individuals, and averred that he had paid out, and accounted for, all moneys due by the state to Livingston. That the sum appropriated to his payment was $4000, the payment of $800, of which was deferred by law, till after the completion of the code of commerce. Leaving only $3200, now due, and of which $2000 had

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been paid to Workman, on Livingston's order, $379 92 were due to the state for taxes, and an execution had issued to the sheriff, of the parish of Orleans therefor, $46 12 for parish taxes, $344 5, were due for taxes on Livington's land, in the parish of Washita, for the years 1820, 1821, and 1822, an execution had issued therefor; $429 91, had been paid (as the balance due) to the plaintiffs.

The parish judge allowed to the plaintiffs judgment for $46 12, and they appealed.

It seems the parish judge allowed all the items stated by the defendant, except the parish tax, which was not due *to the state.*

The sum paid to Workman is admitted to have been correctly paid.

The only difficulty is, as to the amount of Livingston's state taxes, for which execution was in the hands of the sheriffs of the parishes of Orleans and Washita.

We think that the tresurer had right to detain from the present plaintiffs, the purchasers of Livingston's right, all which he might retain from the latter. It is clear, that if Livingston had called for the payment of the sum allowed him, the treasurer would have had the right of retaining those arrearages of taxes, the collec-

tion of which, it is the treasurer's duty to make, and the amount of taxes stated, is only that of those taxes, for which Livingston was reported as a delinquent, by the collectors, to the treasurer, in order that he might proceed to enforce payment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Christy for the plaintiffs, *Preston* for the defendant.

PILIE vs. *DREUX'S SYNDICS.*

APPEAL from the court of the first district.

Same point as in *Saulet* vs. *Dreux's syndics*, Vol. 3, 615.

MARTIN, J. delivered the opinion of the court. The plaintiff states he purchased a slave at the auction of the property of the insolvent, for the price of which he gave two notes, which he has since paid. He therefore prayed that the defendants might be decreed to cancel the mortgage, which he gave for the security of the price.

Wiltz, one of the syndics answered separately, averring his readiness to cancel the mortgage.

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PILIE *vs.* DREUX'S SYNDICS.

The answer of Ferrier & Staels urges the nullity of the alleged sale, it being made by Wiltz and J. Dreux, while the latter was not duly appointed syndic.

The plaintiff had judgment and the defendants appealed.

The sale to the plaintiff was made in the same manner as that of the syndics to Saulet, which was examined in the case of *Saulet* vs. *Dreux's syndics*, lately determined, *vol* 3, 615, and the sale to the plaintiff transferred to him, the insolvent's right in the slave; he has paid the price, it is accordingly just the mortgage he has given should be cancelled.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Moreau for the plaintiff, *Seghers* for the defendants.

FRERET vs. *DREUX'S SYNDICS.*

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court.

The same judgment was given in this case, as in that immediately preceding it.

Grymes for the plaintiff, *Seghers* for the defendant.

WILLIAMS & AL. vs. *SPENCER & AL.*

APPEAL from the court of the third district.

If a case, which ought to have been brought in the district court, is brought in the court of probates, where it is dismissed for want of jurisdiction, the district court, in affirming the judgment of the court of probates cannot pass on the merits of the case.

MARTIN, J. delivered the opinion of the court. This suit originated in the court of probates of East Feliciana, and the object of it was the partition of the estate of Rebecca Horton, the ancestor of all the parties: But the petition states, that the estate, consisting of real and personal property, is claimed by the defendants, under a written conveyance, which the plaintiffs allege was entered into without any consideration.

The answer denies the jurisdiction of the court of probates, and avers title in the defendants.

The court of probates sustained the plea to its jurisdiction, and dismissed the petition. The plaintiffs appealed to the district court, which affirmed the judgment, and they appealed to this court.

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WILLIAMS & AL. vs. SPENCER & AL.

They rely on the act of the legislature of 1820, *p.* 92, and contend that after the affirming the judgment of the court of probates (if it was rightfully affirmed) the district court being seised of the case, ought to have passed on it, on the merits.

According to the plaintiffs' own shewing, the question, on which this case turns, is the insufficiency of the title under which the defendants claim. The title is the thing in dispute. The case was not therefore, within the jurisdiction of the court of probates.

On the appeal, the district court was first to determine whether the judgment of the court of probates was correct, and if it appeared so to affirm.

We do not think that in any case the appellate court can give any other judgment than the judge *a quo* could and ought to have given.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Watts and Lobdell for the plaintiffs.

WICKNER vs. *CROGHAN.*

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WICKNER vs. CROGHAN.

A payment when not applied by the payor, must be imputed to the debt he had the greatest interest to discharge.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff states she sold the defendant a tract of land in April 1818, for $8,000, payable one half on the 1st of January following, and one-half one year thereafter, and, in February. 1819, she sold him another tract, for $18,000, payable by equal instalments, in March, 1820 and 1821; that the defendant, at various periods, paid several sums, amounting in the aggregate to $20,641 42, with interest thereon down to April 4, 1823, when the parties came to a settlement, in which they agreed that $5358 remained due, for which she received two promissory notes, bearing interest at 10 per cent. per year, which remain unpaid.

On this she procured a writ of seizure and sale, on the first tract, for the price of which she had retained a special mortgage.

On motion of the defendant she was ruled to shew cause why the order should not be set aside; neither of the notes being shewn to refer to the price of the tract. The rule was discharged and the plaintiff appealed.

We think the court erred. The payment of

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the price of the first tract was secured by a mortgage; that of the second was not.

The payments made by the defendant, must be first imputed to the *first* debt as the one which he had the greatest interest to discharge, *i. e.* that which was the most burthensome, being secured by mortgage, which was also the oldest. *Civ. Code.* 290, *art.* 196.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the rule obtained by the defendant against the plaintiff be made absolute, and it is further ordered, that she pay costs in both courts.

Cuvillier for the plaintiff, *Pierce* for the defendant.

POUTZ vs. *LOUISIANA STATE INSURANCE CO.*

The march of French troops into Spain in 1823, was an act of war of France against Spain.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioner insured with the defendants a quantity of merchandise, on board the ship Adele, bound for Havre, on a premium of twelve per cent. on their estimated value, but

subject to the condition that the insurers should return ten per cent. in case no act of war took place between France and Spain during the voyage.

The vessel reached Havre, the 17th of April, 1823, and on the 8th of the same month the French armies entered Spain.

The judge of the court of the first instance, decided in favor of the defendants. The petitioner appealed.

We are at a loss to conceive on what grounds it was expected this action could be maintained.

The policy of insurance does not make the return of a part of the premium depend on *a declaration of war*, but *an act of war*. The invasion of Spain by the French armies was most emphatically the latter. Its object was not merely to make war in the ordinary acceptation of the term, but to overthrow the government of the country. It was war against the constitutional and legitimate government of Spain, and it must have been in relation to that government the parties contracted. They did not intend to make their policy of insurance depend on the question who possessed *de jure* the sovereign authority of that country. Nor

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is it a question courts of justice can decide. They can only look to the government, which is recognised by their own. That established in Spain, at the period of the invasion by the French, was considered by the government of the United States, as representing the nation. An invasion, to destroy that government, must be considered an act of war against the state it represented; nor can it change the character of the act, that the French were secretly invited by the king to destroy the liberties of his country, and restore him to absolute power; until they succeeded, they were making war against the nation, because they were making war against the authorities constituted by that nation, and which authorities formed, at that time, its government. Had the patriots of Spain succeeded in repelling that invasion, and maintained the form of government they had established, there can be no doubt war would have existed between the two countries. Their failure cannot change the nature of the act. It must be tested by the situation of the contending parties, at the time the contest commenced, and while it continued, and not by their position after. There was no civil war in Spain, when France invaded it. There was

not two parties contending by arms for the government. There was but one, that which the French armies overthrew, and until they succeeded, they warred against the nation, because they warred against those who represented it. 3 *Wheaton*, 639.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Grymes and Eustes for the plaintiff, *Workman* for the defendants.

MONTILLET vs. *SHIFF.*

If a bet be made on the election of governor, to be determined by the returns of all parishes in the state, and two parishes make now return, the bet is a draw one.

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. This is a suit brought by the depositor against the depositee, or stock holder of $1000 which he alleges were placed in the hands of the latter, without stating for what purpose; but claims a right to recover back the amount. The answer of the defendant admits the deposit, states the cause of it, being a wager between the plaintiff and one Hamlet, depending

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on the respective number of votes that J. Villeré and B. Marigny. should obtain from the people of the state, as candidates in opposition for the office of governor, at the election. Hamlet beted on Villeré and the plaintiff on Marigny, and that the bet being determined by the returns of the votes to the legislature in favor of the former, he paid to him the amount thereof, in pursuance of the deposit.

The defendant obtained judgment, in the court below, from which the plaintiff appealed.

The appellant, by his counsel contends, that according to the terms of the wager (which was reduced to writing,) it has not been decided; and from accidents, not within the control of either of the parties, never can be determined; and that consequently the aleatory contract has become null and void, or, in wagering language, it stands as a drawn bet, and each party has a right to withdraw his stake. The correctness of these propositions, on the part of the plaintiff, depends much on the true meaning of the last stipulation in the contract. If it must be so construed, as to shew clearly the intention of the parties was, not to submit to any other calculation of the amount of votes, which each candidate obtained from the peo-

ple, but that which should be made according to the official returns, from the *whole state*. We are of opinion that the appellant ought to succeed in his action, because the statement of facts shews that no returns were made from two of the parishes of the state. The agreement is written in the French language, and that clause of it, on which the rights of the parties mainly rests, is expressed in the following term: "*Bien entendu que cela s'entendra dans tout l'etat, et d'apres les rapports qui seront faits.*" In the construction or interpretation of laws, or contracts, a primary rule is, that effect if possible, should be given to the whole context, and that every provision should be enforced to the full extent, unless such interpretation would lead to absurdity and nonsense.

In the present case, the parties made their bet on the number of votes, which should be given to the two candidates throught the whole extent of the state, according to the official returns. But official returns were not made from all the election districts, and therefore the bet was not and could not be determined, unless we suffer the latter part of the clause of the contract so to control the first, as to render it null and of no effect, and subject the bet to be

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determined by the returns actually made. This we think would violate all rules of fair construction. The returns, which were made in conformity with the constitution and laws of the state, were sufficient to place Mr. Villere on the list of those, who were to be finally voted for by the legislature. and he might have been made governor of the state.

But from the whole contract between the parties to the present suit, in relation to their bet, it is clearly seen that they did not choose to subject its decision to the same accidents, in the official returns, which must have exhibited either one or other of the candidates to the legislature, as having the greatest number of votes. Their wager has not yet been determined, and the stockholder has paid it over in error. Whether it may yet be decided is questionable; but it is a question not required to be settled in the present case. Before concluding it is however proper for us to state, that the plaintiff is not in the situation of a loser, who has voluntarily paid, on the contrary, the money has been delivered to the supposed winner, by the stakeholder, contrary to the will and intention of the appellant; consequently the appellee cannot with any propriety or justice invoke

that part of the code, which refuses an action to a person, who has lost and paid money on an illegal bet.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant and appellee, one thousand dollars, with interest at the rate of 5 per cent. per annum from the judicial demand, and costs in both courts.

Dennis for the plaintiff, *Grymes* for the defendant.

LOUISIANA STATE BANK vs. *ELLERY.*

Appeal from the court of the first district.

Notice of the protest of a note, is improperly given to an attorney, with special powers, which do not authorise him to receive such a notice.

MARTIN, J. delivered the opinion of the court. The defendant is sued as endorser of a promissory note. She pleaded the general issue. There was judgment of nonsuit in her favor, and the plaintiffs appealed.

The statement of facts shews, that the execution and endorsement of the note were admit-

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ted. A notary public made the demand on the fourteenth of October, and gave notice to J. P. Morgan, the defendant's attorney, appointed by a power annexed to the record, who under it had endorsed the note for the defendant. She left the state before the endorsement, and has ever resided out of it, has no domicil in it, but has property therein, administered by her said attorney.

The power authorises Morgan "to transact the following concerns in and with the Louisiana State Bank:—to receive and sign receipts for all dividends—to vote—to deposit money in said institution, and draw checks—to lodge promissory notes—finally, the institution is empowered to receive the attorney's signature for the the constituant on all acceptances of bills of exchange and endorsements of promissory notes—lastly, she binds herself, her heirs and assigns, to all the acts of her said attorney, touching the premises."

The power is a special one, and cannot be extended beyond what is expressed in it. The plaintiffs do not allege that it was not known where the defendant resided, so that she could not be notified by the mail, &c, The power to

receive notice is not necessarily included in that of endorsing.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs,

Grymes for the plaintiffs, *Hennen* for the defendant.

RICHARDS & AL. vs. MORGAN.

APPEAL from the court of the parish and city of New-Orleans.

No appeal lies from a judgment given against a sheriff, on account of his having taken insufficient bail when less than $300 is claimed from him, although more was demanded from the defendant in the original suit.

MARTIN, J. delivered the opinion of the court. The plaintiffs, having obtained judgment against Gilly, as bail of Blair, their judgment debtor, and being unable to obtain satisfaction, alleging the insufficiency of Gilly, proceeded against the present defendant, the sheriff, who had arrested their judgment debtor, claiming $257, with interest from the 26th of March, 1823. They had judgment and the defendant appealed.

Their counsel demands the dismissal of the appeal, the suit being for less than $300. The application is resisted on the ground that the o-

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riginal suit, on which bail was taken, was for a much larger claim, & that the prosecution of the insufficient bail, and the present defendant are mere incidents or accessories, which follow the nature of the principal action; the case is likened to a suit, in the court of the United States, in which the bail and marshal may be attacked in that court, although the bail may be a citizen of another state than that in which he is sued.

It appears to us that the notice, given to the sheriff that the plaintiffs considered him as liable to pay the amount of the judgment, on the ground of his having taken insufficient bail, although it may be a continuation of the original suit, is *quoad* the sheriff, an original claim; not unlike that of a surety sued for a claim against his principal, ascertained by judgment. It could not be urged, that, because the plaintiffs have demanded more than $300 from the principal, the surety could appeal on a suit in which a claim, for less than that sum, was brought against him.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Preston for the plaintiffs, *Duncan* for the defendant.

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DUBREUIL vs. SOULIE.

DUBREUIL vs. *SOULIE.**

Appeal from the court of the third district.

PORTER, J. delivered the opinion of the court. The plaintiff prayed for an injunction against an execution, issued on a twelve months bond, given for the six town lots, sold to satisfy a judgment in favor of the defendant, as syndic of Tanneret and Gourjon, against the plaintiff and his wife, Eliza B. Dubreuil. The grounds on which the writ is asked for, are, that the sheriff had not made him a conveyance, and that the property belongs to to the minor children of his wife.

If the party who, on a *fi. fa.* points out property as belonging to the defendant, and becomes the last bidder, he cannot have an injunction, on the ground that the property belonged to another, and so he acquired no title.

The defendant pleaded the general issue, and the court, on hearing the parties, being of opinion the plaintiff had failed to make out his case, dissolved the injunction; from which judgment he appealed. The cause has been submitted without argument.

The evidence, spread oo the record, shews that the present plaintiff was one of the defendants in the suit, under the judgment rendered in which, this property was sold: that at the sale he became the purchaser thereof: and that

* This case and the following, were determined in March last, and were accidentally omitted among the cases of that term.

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the very property to which he now complains he has not got a good title, was pointed out by himself to the sheriff. Putting his case therefore, on the best footing, he deceived the officer, and the original plaintiff, by designating property which did not belong to the defendants. After doing this, he has no right to claim the equitable interference of a court of justice; more particularly, as the only consequence that would result from his obtaining it, would be, to leave him responsible on the original judgment. His case, in fact, is nothing else than a complaint, that he has sustained an injury by having paid his debt, with the property of others.

An appeal taken from a judgment, which most justly and legally refused to sustain such a pretension, can have had no other object but vexation and delay.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per cent on the amount of the execution, for the delay occasioned by this appeal.

De Armas for the plaintiff, *Dennis* for the defendant.

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The sheriff's vendee cannot have anjunction because his deed is not in the form prescribed by law.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. This case is between the same parties, and exhibits nearly the same features, with that just decided. The principal ground, stated in this cause for the injunction, is that the deed of conveyance, delivered by the sheriff, is not in the form pointed out by the statute.

Admitting all the allegations, contained in the petition, we see no ground whatever for maintaining the injunction. The plaintiff was defendant, in the suit wherein this properyt was sold; he purchased himself, and if he has not a good title under the sheriff, he must be presumed to have a good one from another source; for he bought it as already belonging to himself. Again, he is responsible in case of eviction; so that if he succeeded here, he would be immediatelp answerable over, on the original judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per cent. dama-

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ges on the amount, for which execution issued on the twelve monts' bond.

De Armas for the plaintiff, *Dennis* for the defendant.